Supreme Court, U.S.
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In the

Supreme Court of the United States

Term: October 1998

RAYMOND MOYLE,

Petitioner,

v.

DIRECTOR OFFICE OF WORKERS COMPENSATION PROGRAMS; JONES OREGON STEVEDORING,

Respondents

On Petition for a Writ of Certiorari
To the United States Court of Appeals
for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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December 3, 1998.

QUESTIONS PRESENTED

The Longshore and Harbor Workers' Compensation Act (LHWCA) prohibits "assignment, release, or commutation" of benefits due under the Act. 33 U.S.C. § 916. The Social Security Act provides that benefits due from or payable by the United States are subject to certain withholding under state laws "to the same extent as if the United States were a private person." 42 U.S.C. § 659

The question presented for review is whether the Social Security Act repealed by implication 33 U.S.C. § 916, the "anti-alienation" provision of the LHWCA, for those cases in which longshore benefits are payable by the United States.

PARTIES TO THE PROCEEDINGS IN THE COURT BELOW

The petitioner, Raymond Moyle, was a petitioner before the Ninth Circuit Court of Appeals. The Director, Office of Workers' Compensation Programs and Jones Oregon Stevedoring Co. were respondents in that proceeding.

The Court of Appeals' case number was CA 96-70875. The Benefits Review Board case number was 94-2390.

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1998

RAYMOND MOYLE, *Petitioner,*

v.

DIRECTOR OFFICE OF WORKERS COMPENSATION PROGRAMS and JONES OREGON STEVEDORING, *Respondents*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The petitioner, Raymond Moyle, respectfully petitions for a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit, entered in this case on June 29, 1998.

OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit is reported at 147 F.3d 1116 and is reprinted in Appendix A hereto. The Order denying the petition for rehearing is reprinted in Appendix D hereto.

The Decision and Order of the Benefits

Review Board is not reported. It is reprinted in Appendix B hereto.

The Decision and Order of the Administrative Law Judge is reported at 28 BRBS 73 (ALJ). It is reprinted in Appendix C hereto.

JURISDICTION.

(1) The opinion of the Ninth Circuit Court of Appeals was filed on June 29, 1998. Petitioner's petition for rehearing was denied on September 4, 1998.[1]

(2) The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The pertinent provisions of 33 U.S.C. § 916 and 42 U.S.C. § 659 are set forth below:

> "No assignment, release, or commutation of compensation or benefits due or payable under this Chapter, except as provided by this Chapter, shall be valid, and such compensation and benefits shall be exempt from all claims of creditors and from levy, execution, and attachment or other remedy for recovery or collection of a debt, which exemption may not be waived." 33

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[1] The Ninth Circuit granted claimant's motion for enlargement of time to file the petition for rehearing.

U.S.C. § 916.

"Notwithstanding any other provision of law (including section 407 of this title and section 5301 of Title 38), effective January 1, 1975, moneys (the entitlement to which is based upon remuneration for employment) due from, or payable by, the United States or the District of Columbia (including any agency, subdivision, or instrumentality thereof) to any individual, including members of the Armed Forces of the United States, shall be subject, in like manner and to the same extent as if the United States or the District of Columbia were a private person, to withholding in accordance with State law enacted pursuant to subsections (a)(1) and (b) of section 666 of this title and regulations of the Secretary under such subsections, and to any other legal process brought, by a State agency administering a program under a State plan approved under this part or by an individual obligee, to enforce the legal obligation of the individual to provide child support or alimony." 42 U.S.C. § 659.

STATEMENT OF THE CASE

Petitioner, Moyle, was awarded compensation for permanent total disability, with

benefits ultimately paid out of the LHWCA Special Fund, which is created from assessments on private longshore insurers and administered by the United States.[2] An Oregon state court ordered that Moyle's benefits be garnished to pay spousal support. The Director of the Division of Longshore and Harborworkers' Compensation complied with the garnishment order over Moyle's objections that the "anti-alienation" provision of the LHWCA prohibited garnishment of his benefits.

This case involves the construction of two statutory provisions: 33 U.S.C. § 916, which prohibits alienation of benefits paid under the LHWCA, and 42 U.S.C. § 659, which permits garnishment of moneys payable by the United States to the same extent as if the United States were a private person. Although neither statutory provision refers to the other, they create an apparent inconsistency that must be reconciled if possible.

The matter was heard by

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[2] The LHWCA creates a Special Fund that is financed by annual assessments on LHWCA insurers and self-insured employers. The Fund operates as a form of risk-sharing pool for employers who hire disabled workers. The LHWCA places a two-year cap on the length of time an employer or its private insurance carrier will be liable for permanent disability benefits if the worker had a prior permanent disability that partially contributed to the new disability. 33 U.S.C. 908(f)(1). After two years, the LHWCA provides that the remaining permanent disability benefits are paid out of the Special Fund. 33 U.S.C. §908(f)(2)(A). This fund is administered by the United States Treasury. 33 U.S.C. §944(a). The Treasurer makes dispursements from the Fund upon order of the Director, OWCP. 20 C.F.R. § 702.143.

Administrative Law Judge Steven Halpern under the provisions of 33 U.S.C. § 919(d). On April 18, 1994, ALJ Halpern granted the Director's motion for summary judgment. ALJ Halpern concluded that the two provisions cannot be reconciled and, therefore, that the "anti-alienation" provision of the LHWCA was repealed by the subsequently enacted Social Security Act garnishment provision.

Moyle appealed ALJ Halpern's Decision and Order to the Benefits Review Board. The Decision and Order was to be reviewed by the Board under the provisions of 33 U.S.C. § 921(b). However, the Benefits Review Board did not review the ALJ's decision but affirmed it pursuant to the Omnibus Consolidated Rescission and Appropriations Act of 1996, Pub. L. No. 104-134, 1996 U.S.C.C.A.N. (110 Stat.) 1321, 1321-219, which provides that cases pending before the Board for more than one year are considered affirmed if not acted upon before September 12, 1996. ALJ Halpern's Decision and Order thus became the final Order of the agency.

Moyle then petitioned for review in the Ninth Circuit Court of Appeals, which had jurisdiction to review the Order of the Benefits Review Board under 33 U.S.C. § 921(c). The Ninth Circuit affirmed the decision that "the SSA Garnishment provision impliedly repealed the LHWCA Anti-Alienation provision." The Ninth Circuit denied Mole's petition for rehearing.

Moyle brings his case before this Court noting jurisdiction pursuant to 28 U.S.C. § 1254(1).

REASONS FOR GRANTING THE PETITION

Petitioner seeks this Court's intervention because the Ninth Circuit misconstrued a federal statute of broad applicability to the nation's dock and waterfront workers who are covered under the Longshore and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. §§ 901-950, and departed from this Court's rules for finding a repeal by implication.

I. The court below erroneously interpreted a federal statute and departed from this Court's established principles regarding repeal by implication.

The Longshore and Harbor Workers' Compensation Act (LHWCA) prohibits "assignment, release, or commutation" of benefits paid under that Act. 33 U.S.C. § 916. Nevertheless, the court below allowed garnishment of the permanent partial disability benefits that Moyle was receiving under the LHWCA. The court allowed garnishment under the assumption that section 916 cannot be reconciled with, and was impliedly repealed by, 42 U.S.C. § 659, of the Social Security Act.[3] That statute makes "moneys

[3] The Administrative Law Judge relied, additionally, upon 5 C.F.R. § 581.103(c)(5), which purports to authorize garnishment under 42 U.S.C. § 659 of "[b]enefits received under the Longshore & Harbor Workers' Compensation Act."

* * * due from, or payable by, the United States" subject to withholding for alimony and child support payments "to the same extent" as if the United States were a private person.[4] Because the two statutes are clearly reconcilable, the court below erroneously found a repeal by implication.

The court below correctly recognized that there has been no express repeal of 33 U.S.C. § 916. Neither that statute nor 42 U.S.C. § 659 refers to the other at all. Congress did not repeal 33 U.S.C. § 916 by implication either.

As this Court has repeatedly explained, there are

> "two well-settled categories of repeals by implication (1) where provisions in the two acts are in irreconcilable conflict, the later act to the extent of the conflict constitutes an implied repeal of the earlier one; and (2) if the later act covers the whole subject of the earlier one and is clearly intended as a substitute, it will operate similarly as a repeal of the earlier act. But, in either case, the intention of the legislature to repeal must be clear and manifest."

However, the regulation can go no farther than its enabling statute; it can override 33 U.S.C. § 916 only if that statute has been repealed.

[4] Moyle's benefits were deemed payments by the United States because the United States administers the Special Fund out of which Moyle's benefits were paid.

Radzanower v. Touche Ross Co., 426 U.S. 148, 154, 96 S.Ct. 1989, 48 L.Ed.2d 540 (1976) (quoting Posadas v. National City Bank, 296 U.S. 497, 503, 56 S.Ct. 349, 352, 80 L.Ed.2d 351, 355 (1934)). The statutes, here, do not fall under the second category of repeal by implication because neither covers the "whole subject" of the other. While 33 U.S.C. § 916 addresses the alienation of all benefits paid under the LHWCA, 42 U.S.C. § 659 waives sovereign immunity for garnishment of money paid by the United States. See Ridgway v. Ridgway, 454 U.S. 46, 72, n.5, 102 S.Ct. 49, 68, 70 L.Ed.2d 39 (1981) (42 U.S.C. § 659 "removes the sovereign immunity of the Government in an action brought to enforce a support obligation.") Thus, it cannot be said that the later-enacted statute was "clearly intended" to replace 33 U.S.C. § 916.

It also cannot be said that the two statutes are in "'irreconcilable conflict' in the sense that there is a positive repugnancy between them or that they cannot mutually coexist." See Radzanower, 425 U.S. at 155. In declaring a repeal by implication, the court below departed from this Court's rules governing that doctrine. If the two provisions are "capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective." Morton v. Mancari, 417 U.S. 535, 551, 94 S.Ct. 2474, 41 L.Ed.2d 290 (1974). In Morton, this Court concluded that a statute granting a preference for hiring Indians to Bureau of Indian Affairs positions could co-exist with the Equal Employment Opportunity Act,

which prohibits employment discrimination on the basis of race. 417 U.S. at 550. Morton exemplifies the principle that this court has articulated in other cases: "Irreconcilable conflict" means more than that the two statutes "produce differing results when applied to the same factual situation, for that no more than states the problem." Radzanower, 426 U.S. at 155. The court below disregarded this admonition when it described 42 U.S.C. § 659 and 33 U.S.C. §916 as "irreconcilable" because the former "permits garnishment of LHWCA benefits" while the latter prohibits garnishment. This does not signify a repeal by implication; it "no more than states the problem."

The court below misconstrued the relevant statute and failed to recognize that the statutes, here, are not only capable of co-existence, but require co-existence. Under 42 U.S.C. § 659, moneys payable by the United States are subject to garnishment only "to the same extent" as if the United States were a private person.[5] The pertinent

[5] The opinion of the court below overlooks the significance of this critical statutory language. Petitioner acknowledges that his brief in the court below focused on other ways to reconcile the statutes and avoid an implied repeal. However, the coexistence permitted by the fact that private longshore benefits may not be garnished to any extent was specifically discussed with the panel at oral argument below and was presented in a petition for reconsideration. Moreover, the issue is the same that has been briefed and argued throughout - whether the garnishment provision of 42 U.S.C. § 659 is in such irreconcilable conflict with 33 U.S.C. § 916 that it must be said to impliedly repeal the anti-alienation provision. The opinion of the court below, which finds an

text of the statute provides:

> "[M]oneys ... due from, or payable by, the United States or the District of Columbia ... to any individual ... shall be subject, in like manner and to the same extent as if the United States or the District of Columbia were a private person, to withholding in accordance with State law ... to enforce the legal obligation of the individual to provide child support or alimony."

42 U.S.C. § 659. (Emphasis added.) The emphasized language requires reference to some external source to determine the extent to which moneys payable by a private person would be subject to garnishment. Here, that external source is 33 U.S.C. § 916, which makes it clear that longshore benefits paid by a private person are not subject to garnishment to any extent.

By declaring that Longshore benefits paid by the Special Fund are subject to garnishment, the court below makes longshore benefits payable by the United States subject to garnishment to a greater extent than if the United States were a private person. The language of 42 U.S.C. § 659, alone, makes it clear that this was not Congress' intention. Thus, the error in the opinion from the court below is evident without even resorting to the

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implied repeal without considering the relevant statutory language, should not be permitted to stand.

maxim that repeal by implication is strongly disfavored.[6]

But when that guiding principle of statutory construction is considered as well, the error in the opinion of the court below is obvious. The two statutes readily co-exist: benefits, whether paid by the United States or by a private carrier, may not be garnished. There is no "clear and manifest" intent to repeal. The courts are precluded from declaring a repeal, implied or otherwise, of 33 U.S.C. § 916.

II. This case presents an important question of federal statutory construction that has not been, but should be, settled by this Court.

Since 1927, the nation's dock and harbor workers have been entitled to receive benefits when they are disabled, and those benefits have been protected from alienation. Ch. 509, 44 Stat. 1424, 1434 (1927) (enacting the LHWCA).

The court below has eliminated seventy years of established protection with no clear

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[6] In the court below, the Director argued that the court should defer to the Director's interpretation of whether 42 U.S.C. § 659 requires a repeal of 33 U.S.C. § 916. However, as the court below correctly reasoned, the Director is not charged with administering the Social Security Act, and, therefore, the Director's resolution of the apparent conflict with a provision of that act is owed no deference. Courts in other circuits have reasoned similarly. See Shanty Town Assocs. Ltd. Partnership v. EPA, 843 F.2d 782, 790 n.12 (4th Cir. 1988); New Jersey Air Nat'l Guard v. FLRA, 677 F.2d 276, 281 n.6 (3d Cir. 1982).

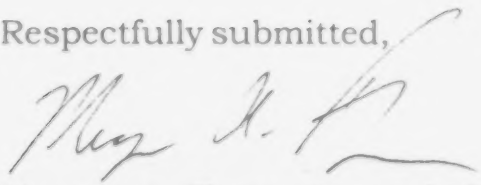
indication that Congress intended this result. Under the ruling set out in the opinion below, every injured longshore worker whose benefits are picked up by the Special Fund loses the protection of 33 U.S.C. § 916.

The critical importance of this issue to the nation's Longshore workers and practitioners is evidenced by the fact that a discussion of the Ninth Circuit's decision in this case was featured as the lead article in the October 1998 *Longshore Newsletter and Chronicle of Maritime Injury Law*, Volume XVI, Issue 7, p. 73. This Court has not, but should, settle this important question.

CONCLUSION

The petition for writ of Certiorari should be granted.

Respectfully submitted,



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Dated: December 3, 1998.

FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RAYMOND V. MOYLE,
Petitioner,
v.
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS; JONES OREGON STEVEDORING CO.,
Respondents.

No. 96-70875
B.R.B. No. 94-2390
OPINION

Petition for Review of an Order of the Benefits Review Board

Argued and Submitted
June 2, 1998—Seattle, Washington

Filed June 29, 1998

Before: Donald P. Lay,* Alfred T. Goodwin, and Harry Pregerson, Circuit Judges.

Opinion by Judge Pregerson

SUMMARY

Labor and Employment/Worker's Compensation

The court of appeals affirmed a decision of the Benefits Review Board. The court held that the Anti-Alienation provision of the Longshore and Harbor Workers' Compensation

*The Hon. Donald P. Lay, Senior U.S. Eighth Circuit Judge, sitting by designation.

Act (LHWCA) does not prohibit garnishment of disability payments to satisfy delinquent spousal support payments.

Petitioner Raymond Moyle was awarded compensation for permanent total disability paid out of the Special Fund established by the LHWCA. A state court ordered the garnishment of Moyle's disability benefits to satisfy his delinquent spousal support payments. The Director of the Division of Longshore and Harbor Workers' Compensation notified Moyle that the division would comply with the court order. Before an ALJ, Moyle argued that the LHWCA Anti-Alienation provision prohibited garnishment of his disability payments to satisfy his delinquent spousal support payments.

The ALJ granted the Director's motion for summary judgment, finding that garnishment of Moyle's benefits was proper. The ALJ determined that the LHWCA Anti-Alienation provision had been repealed in relevant part by the later-enacted SSA Garnishment provision. The ALJ concluded that Moyle's disability benefits could be garnished under the SSA Garnishment provision.

Moyle appealed to the Benefits Review Board, which summarily affirmed the ALJ's decision by operation of law.

Moyle appealed, arguing that the SSA Garnishment provision and the LHWCA Anti-Alienation provision were not in conflict because the SSA Garnishment provision only permits garnishment of moneys due from, or payable by, the United States to satisfy spousal support payments. Moyle also argued that the SSA Garnishment provision only permits garnishment of moneys paid to federal employees.

[1] The only issue was whether the SSA Garnishment provision impliedly repealed the LHWCA Anti-Alienation provision, permitting garnishment of Moyle's disability benefits.

[2] There are two kinds of implied repeal: (1) where provisions in the two acts are in irreconcilable conflict, the later act

to the extent of the conflict constitutes an implied repeal of the earlier one; and (2) if the later act covers the whole subject of the earlier one and is clearly intended as a substitute, it will operate similarly as a repeal of the earlier act. The intention of the legislature to repeal must be clear and manifest.

[3] If the SSA Garnishment provision irreconcilably conflicted with the LHWCA Anti-Alienation provision, the SSA Garnishment provision would control because it was the later-enacted statute.

[4] The SSA Garnishment provision permits garnishment of moneys (the entitlement to which is based upon remuneration for employment) due from, or payable by, the United States to any individual. The provision defines payments that qualify as remuneration for employment that include periodic benefits or other payments under any other system or fund established by the United States which provides for the payment of pensions, retirement or retired pay, annuities, dependents' or survivors' benefits, or similar amounts payable on account of personal services performed by the individual or any other individual.

[5] The provision also defines remuneration for employment to include worker's compensation benefits paid or payable under Federal or State law. Moyle's LHWCA disability payments could have been characterized as "remuneration for employment" that may be garnished under the provision because such payments are worker's compensation benefits payable pursuant to federal law. The plain language of the SSA Garnishment provision and its definitions suggested that the provision *did* apply to Moyle's LHWCA benefits. However, because the SSA Garnishment provision did not explicitly mention benefits paid under the LHWCA, legislative history had to be looked at to determine whether Congress intended to repeal the LHWCA Anti-Alienation provision with the SSA Garnishment provision.

[6] The legislative history explicitly provides that the SSA Garnishment provision permits garnishment of LHWCA benefits. The purpose of the SSA Garnishment provision is "clearly repugnant" to the purpose of the LHWCA Anti-Alienation provision, which prohibits garnishment of LHWCA benefits. [7] Based on the plain language of the SSA Garnishment provision and its legislative history, the SSA Garnishment provision irreconcilably conflicts with the LHWCA Anti-Alienation provision. The legislative history demonstrates Congress' "clear and manifest" intent to repeal the LHWCA Anti-Alienation provision with the SSA Garnishment provision.

[8] Moyle's LHWCA benefits are paid from the Special Fund established under 33 U.S.C. § 944. The Treasurer of the United States is the custodian of the Fund. [9] Moyle's benefits were payable by the United States because the Treasurer was under an obligation to tender the payments due to Moyle from the Special Fund. Moyle failed to show that his LHWCA benefits were not payable by the United States within the meaning of the SSA Garnishment provision.

[10] The SSA Garnishment provision does not limit the provision's application to federal employees. The statute permits garnishment of moneys payable by the United States to any individual. [11] Neither legislative history nor case law limits the SSA Garnishment provision's application to federal employees, nor do they directly discuss whether the SSA Garnishment provision permits garnishment of LHWCA benefits.

COUNSEL

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Laura J. Stomski, United States Department of Labor, Office of the Solicitor, Washington, D.C., for the respondents.

OPINION

PREGERSON, Circuit Judge:

Raymond V. Moyle petitions for review of the Benefits Review Board's ("Board") summary affirmance of an Administrative Law Judge's ("ALJ") decision. The ALJ found that Moyle's disability benefits could be garnished to satisfy his delinquent spousal support payments. Moyle challenged the garnishment as prohibited by the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 916 ("LHWCA Anti-Alienation provision"). But the ALJ found that a later-enacted Social Security Statute, 42 U.S.C. § 659 ("SSA Garnishment provision"), impliedly repealed the LHWCA Anti-Alienation provision and permitted the garnishment. We affirm.

BACKGROUND

Raymond V. Moyle was awarded compensation for permanent total disability on June 26, 1981. Since 1982, those benefits have been paid out of the Special Fund established by 33 U.S.C. § 944 of the Longshore and Harbor Workers' Compensation Act ("LHWCA").[1]

In 1991, an Oregon state court ordered the garnishment of Moyle's LHWCA disability benefits to satisfy his delinquent spousal support payments. The Director of the Division of Longshore and Harbor Workers' Compensation ("Director") notified Moyle that the division would comply with the court order. Moyle then requested a hearing before an ALJ. Before the ALJ, Moyle argued that the LHWCA Anti-Alienation pro-

[1]Section 908(f) of the LHWCA limits an employer's workers compensation liability to the first two years of permanent disability, with subsequent compensation coming from the Special Fund. *See* 33 U.S.C. § 908(f)(2)(A). The Special Fund is financed by a yearly assessment on certain maritime businesses. *See* 33 U.S.C. § 944(c).

vision prohibited garnishment of his disability payments to satisfy his delinquent spousal support payments. The LHWCA Anti-Alienation provision provides that:

> No assignment, release, or commutation of compensation or benefits due or payable under this chapter, except as provided by this chapter shall be valid, and such compensation and benefits shall be exempt from all claims of creditors and from levy, execution, and attachment or other remedy for recovery or collection of a debt, which exemption may not be waived.

33 U.S.C. § 916.

The ALJ granted the Director's motion for summary judgment, finding that garnishment of Moyle's benefits was proper. The ALJ determined that the LHWCA Anti-Alienation provision had been repealed in relevant part by the later-enacted SSA Garnishment provision,[2] which provides that:

> Notwithstanding any other provision of law . . . moneys (the entitlement to which is based upon remuneration for employment) due from, or payable by, the United States or the District of Columbia (including any agency, subdivision, or instrumentality thereof) to any individual, including members of the Armed Forces of the United States, shall be subject, in like manner and to the same extent as if the United States or the District of Columbia were a private person, . . . to any . . . legal process brought, by a State

[2]The SSA Garnishment provision became law in 1975, forty-eight years after the enactment of the LHWCA Anti-Alienation provision. *See* Pub. L. No. 93-647, sec. 101(a), § 459, 88 Stat. 2337, 2357 (1975) (enacting the SSA statute); Ch. 509, § 16, 44 Stat. 1424, 1434 (1927) (enacting the LHWCA statute).

> agency administering a program under a State plan approved under this part or by an individual obligee, to enforce the legal obligation of the individual to provide child support or alimony.

42 U.S.C. § 659(a) (West Supp. 1998).[3] Therefore, the ALJ concluded that Moyle's disability benefits could be garnished under the SSA Garnishment provision.

In reaching this decision, the ALJ noted that the Office of Personnel Management promulgated a regulation that expressly provides that LHWCA benefits are subject to garnishment pursuant to the SSA Garnishment provision. *See* 5 C.F.R. § 581.103(c)(5) (authorizes garnishment of "[b]enefits received under the Longshoremen's and Harbor Workers' Compensation Act").

Moyle then appealed to the Benefits Review Board. The ALJ's decision was summarily affirmed by operation of law when the Board failed to decide the appeal within a year of its filing. We have jurisdiction under 33 U.S.C. § 921(c).

ANALYSIS

A. Standard of Review

We review decisions of the Benefits Review Board for errors of law. *See Sproul v. Director, OWCP*, 86 F.3d 895, 898 (9th Cir. 1996), *cert. denied* 117 S. Ct. 1333 (1997). No special deference is given to the Board's interpretations of the LHWCA. *Id.* But we accord "considerable weight" to the Director's statutory construction of the LHWCA. *See Mallott & Peterson v. Director, OWCP*, 98 F.3d 1170, 1172 (9th Cir. 1996), *cert. denied*, 117 S. Ct. 1842 (1997). "This deference

[3]The SSA Garnishment provision was amended in 1996 and 1997. The amendments did not significantly alter the statutory language relevant here. *See* Pub. L. No. 105-33, Title V, sec. 5542(a), (b), 111 Stat. 251, 631 (1997); Pub. L. No. 104-193, Title III, sec. 362(a), 110 Stat. 2105, 2242 (1996).

extends not only to regulations articulating the Director's interpretation, but also to litigating positions asserted by the Director in the course of administrative adjudications . . . ." *Id.*

But we owe no deference to an agency's resolution of statutory conflicts that implicate legislation that is not administered by that agency. *See Shanty Town Assocs. Ltd. Partnership v. EPA*, 843 F.2d 782, 790 n.12 (4th Cir. 1988) (citing *New Jersey Air Nat'l Guard v. FLRA*, 677 F.2d 276, 281-82 n.6 (3d Cir. 1982)). Following this rule, our court has held that it must independently resolve conflicts between statutes administered by one agency and regulations promulgated by another agency. *See Internal Revenues Serv. v. FLRA*, 706 F.2d 1019, 1023 (9th Cir. 1983).

Therefore, we do not defer to the Director's resolution of the apparent conflict between the LHWCA Anti-Alienation provision and the SSA Garnishment provision. Similarly, we owe no deference to an agency's regulation that attempts to resolve a conflict between the LHWCA Anti-Alienation provision and the SSA Garnishment provision.

B. Law of Implied Repeal[4]

[1] The only issue in this case is whether the SSA Garnishment provision impliedly repealed the LHWCA Anti-Alienation provision, thereby permitting garnishment of Moyle's disability benefits.

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[4]This case does not concern an express repeal because neither statute specifically refers to the other. *See* 1A Norman J. Singer, *Sutherland Statutory Construction* § 23.07, at 332 (reasonably certain identification of affected act necessary for express repeal) ("*Sutherland*"). The fact that the SSA statute provides that it is effective "[n]otwithstanding any other provision of law" also does not evidence an express repeal of the LHWCA statute. *See Kee Leasing Co. v. McGahan (In re the Glacier Bay)*, 944 F.2d 577, 582 (9th Cir. 1991) ("notwithstanding" phrase by itself did not indicate congressional intent to repeal other statute); *Sutherland*, § 23.08, at 334 ("[a]n express general repealing clause to the effect that all inconsistent enactments are repealed, should legally be a nullity").

[2] There are two kinds of implied repeal:

> (1) where provisions in the two acts are in irreconcilable conflict, the later act to the extent of the conflict constitutes an implied repeal of the earlier one; and (2) if the later act covers the whole subject of the earlier one and is clearly intended as a substitute, it will operate similarly as a repeal of the earlier act.

Kee Leasing Co. v. McGahan (In re the Glacier Bay), 944 F.2d 577, 581 (9th Cir. 1991) (quoting *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 154 (1976)). In either case, "the intention of the legislature to repeal must be *clear and manifest*." *Id.* (internal quotations omitted) (emphasis added). "Repeals by implication . . . are not favored and will only be found when the new statute is clearly repugnant, in words or purpose, to the old statute. . . ." *Id.* (internal quotation and citation omitted).

[3] The second type of implied repeal is not present here because the legislation that included the SSA Garnishment provision did not cover the entire subject of workers' compensation. *See generally* Pub. L. No. 93-647, sec. 101(a), § 459, 88 Stat. 2337, 2357 (1975). Therefore, our analysis focuses on whether the SSA Garnishment provision irreconcilably conflicts with the LHWCA Anti-Alienation provision. *See Glacier Bay*, 944 F.2d at 581. If the statutes are irreconcilable, the SSA Garnishment provision controls because it is the later-enacted statute. *See Id.*[5]

[5]Moyle argues that the LHWCA Anti-Alienation provision (enacted in 1927) should control because although the SSA Garnishment provision was enacted in 1975, the LHWCA was amended in 1984—and Congress did not amend the LHWCA Anti-Alienation provision. *See generally* Pub. L. No. 98-426, 98 Stat. 1639 (1984). Moyle contends that Congress' failure to amend the Anti-Alienation provision suggests that it wanted the LHWCA Anti-Alienation provision to control over the SSA Garnishment provision. This argument lacks merit. *See Glacier Bay*, 944 F.2d at 579-83 (finding earlier-enacted statute impliedly repealed by later-enacted statute even though Congress had amended earlier statute after later statute was enacted).

C. Irreconcilable Conflict

"When interpreting a statute, we ordinarily first look to the plain meaning of the language used by Congress. But if the statute is ambiguous, we consult the legislative history, to the extent that it is of value, to aid in our interpretation." *Straub v. A.P. Green, Inc.*, 38 F.3d 448, 452 (9th Cir. 1994) (citations omitted).

[4] The plain language of the SSA Garnishment provision permits garnishment of "*moneys (the entitlement to which is based upon remuneration for employment)* due from, or payable by, the United States . . . to any individual . . . ." 42 U.S.C. § 659(a) (emphasis added). The provision further provides a definition of the types of payments that qualify as "remuneration for employment." The provision explains that such moneys include:

> *periodic benefits . . . or other payments . . . under any other system or fund established by the United States* which provides for the payment of pensions, retirement or retired pay, annuities, dependents' or survivors' benefits, or similar amounts payable on account of personal services performed by the individual or any other individual . . . .

42 U.S.C. § 659(h)(A)(ii)(II). Thus, the Director argues that the SSA Garnishment provision permits garnishment of Moyle's LHWCA benefits because they are periodic benefits paid from a special fund established by the United States pursuant to 33 U.S.C. § 944.

[5] Moreover, the SSA Garnishment provision also defines "remuneration for employment" to include "worker's compensation benefits paid or payable under Federal or State law . . . ." 42 U.S.C. § 659(h)(A)(iii).[6] Moyle's LHWCA disability

[6]This definition of "remuneration for employment" was added by the 1996 amendments to the SSA provision. *See* Pub. L. 104-193, Title III,

payments can thus also be characterized as "remuneration for employment" that may be garnished under the SSA Garnishment provision because such payments are worker's compensation benefits that are payable pursuant to federal law. Therefore, the plain language of the SSA Garnishment provision and its definitions suggest that the provision *does* apply to Moyle's LHWCA benefits. However, because the SSA Garnishment provision does not explicitly mention benefits paid under the LHWCA, we also look to legislative history to determine whether Congress intended to repeal the LHWCA Anti-Alienation provision with the SSA Garnishment provision.

a. Legislative History

In 1977, Senator Nunn introduced various technical amendments to the SSA, including a definition of the SSA Garnishment provision language that permits garnishment of moneys "the entitlement to which is based upon remuneration for employment . . . ." 42 U.S.C. § 659(a). The proposed 1977 amendments defined "remuneration for employment" as "periodic benefits" paid from a "fund established by the United States."[7] 123 Cong. Rec. 9015, 9016 (March 24, 1977); 123 Cong. Rec. 12909, 12910 (April 29, 1977).

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§ 362(a), Aug. 22, 1996, 110 Stat. 2242. Although this definition was added after the ALJ decided Moyle's case in 1994, it provides further support for the proposition that Congress intended for the SSA Garnishment provision to apply to payments such as those made to Moyle under the LHWCA.

[7]The 1977 proposed amendments, including this definition, were ultimately enacted into law in substantially identical terms. The definition of "remuneration for employment" was originally found in 42 U.S.C. § 662(f). However, § 622 was repealed effective six months after August 22, 1996. *See* Pub. L. 104-193, Title III, § 362(b)(1), Aug. 22, 1996, 110 Stat. 2246. But the above definition of "remuneration for employment" can now be found at 42 U.S.C. § 659(h)(A)(ii)(II) in substantially the same terms.

More importantly, the legislative history explains that the amendments provide a definition of "remuneration for employment" because there were "questions as to the kinds of remuneration which are covered by the [SSA Garnishment provision] . . . ." 123 Cong. Rec. 9015, 9019 (March 24, 1977); 123 Cong. Rec. 12909, 12913 (April 29, 1977). The legislative history further lists the various types of payments that may be garnished and explicitly states that the SSA Garnishment provision applies to "*payments under . . . the Longshoremen's and Harbor Workers' Compensation Act* (but only in cases where the payments are made by the United States)." 123 Cong. Rec. 9015, 9019 (March 24, 1977); 123 Cong. Rec. 12909, 12913 (April 29, 1977) (emphasis added).[8]

[6] Therefore, this legislative history *explicitly* provides that the SSA Garnishment provision permits garnishment of LHWCA benefits. The purpose of the SSA Garnishment provision is thus "clearly repugnant" to the purpose of the LHWCA Anti-Alienation provision, which prohibits garnishment of LHWCA benefits. *See Glacier Bay*, 944 F.2d at 581 (implied repeals "will only be found when 'the new statute is clearly repugnant, in words or purpose, to the old statute . . . .' ").

[7] Based on the plain language of the SSA Garnishment provision and its legislative history, we find that the SSA Garnishment provision irreconcilably conflicts with the LHWCA Anti-Alienation provision. The legislative history that accompanies the SSA Garnishment provision's 1977 amendments

[8]Finally, the Office of Personnel Management ("OPM") has issued a regulation that provides that the SSA Garnishment provision authorizes garnishment of "[b]enefits received under the Longshore and Harbor Workers' Compensation Act." *See* 5 C.F.R. § 581.103(c)(5). We note that this regulation also supports the Director's argument, even though we recognize that the standard of review in this case does not require us to defer to one agency's resolution of a statutory conflict involving legislation that is not administered by that agency. *See Shanty Town*, 843 F.2d at 790 n. 12; *Internal Revenue*, 706 F.2d at 1023.

demonstrates Congress' "clear and manifest" intent to repeal the LHWCA Anti-Alienation provision with the SSA Garnishment provision.

D. Moyle's Arguments

Moyle makes two main arguments to support a finding that the statutes are *not* in irreconcilable conflict. Both arguments are based on purported ambiguities in the language of the SSA Garnishment provision. Neither of these arguments succeed because they fail to undermine the plain language of the SSA Garnishment provision and its legislative history, both of which evidence the legislature's "clear and manifest" intent to repeal the LHWCA Anti-Alienation provision with the SSA Garnishment provision.

1. Moneys Due From or Payable by the United States

Moyle argues that the two statutes are *not* in conflict because the SSA Garnishment provision only permits garnishment of "moneys . . . due from, or payable by, the United States" to satisfy spousal support payments. *See* 42 U.S.C. § 659. He contends that his LHWCA benefits are not "due from, or payable by," the United States and therefore are not covered by the SSA Garnishment provision.

[8] Moyle's LHWCA benefits are paid from the Special Fund established under 33 U.S.C. § 944. The Treasurer of the United States is the custodian of the Fund. *See* 33 U.S.C. § 944(a). "[A]ll moneys and securities in [the Special Fund] shall be held in trust by such Treasurer *and shall not be money or property of the United States*." *Id.* (emphasis added). The Special Fund is financed by a yearly assessment levied against maritime self-insured employers and insurance companies. *See* 33 U.S.C. § 944(c). Thus, Moyle contends that his benefits are not "due from, or payable by" the United

States because the Special Fund is financed by private employers and is not the property of the United States.

The Director admits that the Special Fund is not the property of the United States and, therefore, moneys owed from the Fund are not "due from" the United States. But the Director argues that the Special Fund payments are moneys "payable by" the United States because the Treasurer, as custodian, "is authorized to disburse moneys" from the Fund. *See* 33 U.S.C. § 944(b); *see also* 20 C.F.R. § 702.143 ("[t]he Treasurer shall make disbursements from such funds only upon the order of the Director, OWCP . . . .").

Several terms in the SSA Garnishment provision are defined in related provisions, *see* 42 U.S.C.A. § 659(i) (West Supp. 1998); 42 U.S.C. § 662 (1994) (repealed), but the meaning of the term "payable by" is not set out. But the plain meaning of the term suggests that Moyle's LHWCA benefits are "payable by" the United States. *See Straub,* 38 F.3d at 452 (look to "plain meaning" of language used by Congress when interpreting a statute). Black's Law dictionary provides that: "A sum of money is said to be payable when a person is under an obligation to pay it." BLACK'S LAW DICTIONARY 1128 (6th ed. 1990). Black's also defines the verb "pay": "To discharge a debt by tender of payment due; to deliver to a creditor the value of a debt, either in money or in goods, for his acceptance." *Id.*

[9] Under this definition, Moyle's benefits are "payable" by the United States because the Treasurer is under an obligation to tender the payments due to Moyle from the Special Fund. Thus, Moyle fails to show that his LHWCA benefits are *not* moneys "payable by" the United States within the meaning of the SSA Garnishment provision.

2. Application of the SSA Garnishment Provision to Private Employees

Moyle also argues that the SSA Garnishment provision only permits garnishment of moneys paid to *federal*

employees. If the SSA Garnishment provision only applies to federal employees, it cannot be in conflict with the LHWCA Anti-Alienation provision, because the LHWCA only provides compensation for *private sector* employees such as Moyle. *See* LHWCA § 903(b) ("[n]o compensation shall be payable in respect of the disability or death of an officer or employee of the United States, or any agency thereof, or any State or foreign government, or any subdivision thereof.")

[10] The plain language of the SSA Garnishment provision *does not* limit the provision's application to federal employees. Indeed, the statute permits garnishment of moneys "payable by, the United States . . . *to any individual* . . . ." 42 U.S.C. § 659(a).[9]

[11] Despite this plain language, Moyle points to legislative history and case law in support of his argument. But these sources do not limit the SSA Garnishment provision's application to federal employees, nor do they directly discuss whether the SSA Garnishment provision permits garnishment of LHWCA benefits. But Moyle relies on these sources because they routinely discuss the SSA Garnishment provision in terms that suggest that it only applies to federal employees.

For example, the legislative history available in *United States Code Congressional and Administrative News* explains that although federal employees' wages previously could not be garnished, the SSA Garnishment provision "provide[s] that the wages of Federal employees, including military personnel, would be subject to garnishment in support and alimony cases." S. Rep. 93-1356, at ___, *reprinted in* 4 U.S.C.C.A.N. 8133, 8157 (1974). But this statement merely discusses how the SSA Garnishment provision affects federal employees. It *does not limit the statute's application* to federal employees.

[9]The term "individual" is not defined in related statutes. *See* 42 U.S.C.A. § 659(i) (West Supp. 1998); 42 U.S.C. § 662 (1994) (repealed).

Moreover, the paragraph also ambiguously states that, "[i]n addition, annuities and other payments under Federal programs in which entitlement is based on employment would also be subject to attachment for support and alimony payments." *Id.* The legislative history does not specify whether this last sentence refers only to payments made to federal employees, or to all such payments. Finally, this report also states that the SSA Garnishment provision would "override provisions in various social insurance or retirement statutes which prohibit attachment or garnishment." *Id.* This statement demonstrates that Congress did envision the SSA Garnishment provision as an implied repeal of statutes similar to the LHWCA Anti-Alienation provision. This legislative history can be read to undermine Moyle's claim, not to support it.

Similarly, the amending provisions that revised the SSA Garnishment provision in 1996 and 1997 are both entitled "Authority to Collect Support from *Federal Employees*." Pub. L. No. 105-33, sec. 5542(a), (b), 111 Stat. 251, 631 (1997); Pub. L. No. 104-193, § 362, 110 Stat. 2105, 2242 (1996) (emphasis added). The legislative history of the 1996 revision also repeatedly refers to federal employees without mentioning individuals in the private sector. *See* H.R. Rep. No. 104-651, at 1429-30, *reprinted in* 5 U.S.C.C.A.N. 2183, 2488-89 (1996). Describing the version of the SSA Garnishment provision at issue here, the 1996 House Report states: "Federal law allows the wages of *Federal employees* to be garnished to enforce legal obligations for child support or alimony." *Id.* at 1429 (emphasis added). But the report also continues ambiguously: "Federal law provides that moneys payable by the United States *to any individual* are subject to being garnished in order to meet an individual's legal obligation to provide child support or make alimony payments." *Id.* (emphasis added). Again, although these sources sometimes discuss the SSA Garnishment provision in terms that suggest that it only applies to federal employees, they do not explicitly limit the

statute's application to federal employees, nor do they consider the statute's effect on LHWCA benefits.

Finally, the alleged ambiguity in the SSA Garnishment provision was mentioned in *DeTienne v. DeTienne*, 815 F. Supp. 394 (D. Kan. 1993). The court remarked that the SSA Garnishment provision "appears to refer only to wages due to federal government employees," because the statute "does not mention the garnishment of Social Security disability benefits payable to private-sector employees," *id.* at 396, and because "[t]he federal cases interpreting and applying [the SSA Garnishment provision] primarily have arisen from garnishments of federal employees' wages and salaries." *Id.* at 396 n.1. But the court did not hold that the SSA Garnishment provision *does not* reach any federal payments made to private individuals, nor did it contemplate the provision's effect on LHWCA benefits in particular. It is true that the majority of the cases that apply the SSA Garnishment provision concern compensation paid to federal employees.[10] But Moyle does not cite any legislative or judicial authority that states that LHWCA benefits are not subject to the SSA Garnishment provision, nor have we discovered any such authority. Therefore, we reject Moyle's contention that the SSA Garnishment provision only applies to compensation paid to federal employees.

CONCLUSION

The plain language of the SSA Garnishment provision and its legislative history demonstrate the legislature's "clear and manifest" intent to repeal the LHWCA Anti-Alienation provision when it enacted the SSA Garnishment provision. These two provisions irreconcilably conflict because the SSA Gar-

[10] *See, e.g., United States v. Morton*, 467 U.S. 822, 826 (1984) ("Congress decided that compensation payable to *federal employees*, including members of the Armed Services, should be subject to legal process to enforce employees obligations to provide child support or make alimony payments.") (emphasis added).

nishment provision permits garnishment of LHWCA benefits and the LHWCA Anti-Alienation provision prohibits such garnishment. Therefore, we affirm the Board's summary affirmance of the ALJ decision that concluded that the SSA Garnishment provision impliedly repealed the LHWCA Anti-Alienation provision.[11]

[11]Moyle has requested an award of attorney's fees. But the LHWCA fee provision, 33 U.S.C. § 928, does not permit an award of attorney's fees against the Special Fund, which is the only entity here that might pay Moyle his fees. *See Director, OWCP v. Robertson*, 625 F.2d 873, 877-78 (9th Cir. 1980).

U.S. Department of Labor Benefits Review Board
800 K Street N.W.
Washington, D.C. 20001-8001

Re: **Raymond V. Moyle v. Jones Oregon Stevedoring Company, Director, Office of Workers' Compensation Programs (Case No. 93-LHCA-1686) (OWCP No. 14-0045077) (BRB No. 94-2390)**

NOTICE FROM THE CLERK OF THE BENEFITS REVIEW BOARD

Pursuant to the provisions of Public Law 104-134 (Omnibus Appropriations for Fiscal Year 1996), enacted on April 26, 1996, appeals from decisions under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. 901, *et seq.*, which have been pending before the Benefits Review Board for more than one year, shall, if not acted upon before September 12, 1996, be considered affirmed by the Board and shall be considered the final order of the Board for purposes of obtaining a review in the United States courts of appeal. According to our records, the appeal in the instant case has now been pending at the Benefits Review Board for more than one year. Therefore, consistent with Public Law 104-134, this decision pending review, by the Benefits Review Board is considered affirmed and shall be considered the final order of the Board for purposes of obtaining a review in the United States courts of appeal. Attached please find an outline of the procedures for appealing to the courts of appeal.

According to our records, the appeal in the instant case has now been pending at the Benefits Review Board for more than one year. Therefore, consistent with Public law 104-134, this decision pending review by the Benefits Review Board is considered affirmed and shall be considered the final order of the Board for purposes of obtaining review in the United States courts of

appeal. Attached please find an outline of the procedures for appealing to the courts of appeal.

DATE: SEP. 12, 1996

Sincerely

/s/
Thomas 0. Shepherd, Jr.
Clerk of the Board

U.S. Department of Labor

Office of Administrative
Law Judges
211 Main Street - Suite 600
San Francisco, California 94105

In the Matter of

RAYMOND V. MOYLE,

Claimant,

v.

JONES OREGON
STEVEDORING CO.,

Self-Insured Employer.

CASE NO. 93-LHC-1686

OWCP NO. 14-45077

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For the Director, OWCP

Before: STEVEN E. HALPERN
Administrative Law Judge

DECISION AND ORDER

Claimant herein was awarded compensation for permanent total disability by June 26, 1981 Order of the Honorable Henry B. Lasky. Pursuant to said Order, respondent having been afforded the relief provided by §8(f) of the Act, liability for the payment of Claimant's compensation was assumed by the Special Fund in 1982.

Pursuant to a "Judgment and Decree of Dissolution of Marriage" issued by the Circuit Court of the State of Oregon for the County of Clackamas in 1987, claimant became obligated to pay spousal support in the amount of $700.00 per month.

Claimant having been found to be delinquent in his said obligation to the extent of $31,395.10 the aforesaid court, in August 1991, issued an Order directed to the US Department of Labor, Employment Standards Administration, Office of Workers' Compensation Programs, Longshore and Harbor Workers' Compensation Programs, requiring that "an amount equal to 65V of claimant's "Special Fund payments" be withheld and paid over to claimant's divorced wife until the delinquency was paid in full, and thereafter to withhold and pay over to said divorced spouse as continuing monthly support payments the lesser of $700.00 or 60% of claimant's "Special Fund payment."

Thereafter, claimant was advised by the Director, Division of Longshore and Harbor Workers Compensation that "we are complying" with the aforesaid Order. Claimant, being dissatisfied with the situation, requested that the matter be referred to the Office of Administrative Law Judges, to which the case was referred by the District Director. The matter came on for oral argument on the Director's Motion for Dismissal and Motion for Summary Judgment on December 13, 1993, and was considered submitted as of March 17, 1994 upon receipt of

Claimant's Closing Brief, the Director's Brief having been received on March 16, 1994.

Although claimant has contended otherwise, I do not find there to be involved here any genuine issue as to any material fact such as would require an evidentiary hearing. Rather, the questions presented concern the legal aspects of the procedure as a consequence of which compensation otherwise payable to claimant out of the Special Fund is now being paid in part to his divorced wife in satisfaction of his spousal support payment obligations to her.

The LHCA as amended, provides at §16, as follows:

Sec. 16. No assignment, release, or commutation of compensation or benefits due or payable under this Act, except as provided by this Act shall be valid, and such compensation and benefits shall be exempt from all claims of creditors and from levy, execution, and attachment or other remedy for recovery or collection of a debt, which exemption may not be waived.

However, by amendment to Chapter 7 of the Social Security Act, effective January 1,1975, it was provided that:

Notwithstanding any other provision of law ... moneys (the entitlement to which is based upon remuneration for employment) due from, or payable by, the United States or the District of Columbia (including any agency, subdivision, or instrumentality thereof) to any individual, including members of the armed services, shall be subject, in like manner and to the same extent as if the United States or the District of Columbia were a private person, to legal process brought for the enforcement, against such individual of his legal obligations to provide child support or make alimony payments. (42 U.S.C. §659) In implementation whereof the Office of Personnel Management promulgated a regulation in 1980 (amended in 1983 and 1990) under which, *inter alia,* "Benefits received under the Longshoremen's and Harbor Workers' Compensation Act" were expressly made subject to garnishment for "support and maintenance of a spouse or former spouse." (5 CFR 581.101,

581.102 generally, 581.102 (e), 581.103 (c) (5) Thus, giving full effect to all of the foregoing, while benefits paid to claimant by the employer are not subject to garnishment for any reason by virtue of §16 of the Act, by operation of 42 U.S.C. §659 as implemented by 5 CFR Part 581, compensation paid out of the Special Fund is subject to garnishment for the "support and maintenance of ... (claimant's) former spouse" since such are moneys "payable by the United States ... under the Longshoremen's and Harbor Workers' Compensation Act." While claimant apparently so contends, he has advanced no support for the proposition that congress was without power to validly enact omnibus legislation which overrides "any other provision of law" (including §16 of the LHWCA), so as to make amenable to garnishment for payment of alimony moneys "payable by ... any agency" of the United States (including the Office of Workers Compensation Programs Division of Longshore and Harbor Workers' Compensation". Nor is there support for the proposition that OPM's implementing, regulation is not consistent with said legislation, exceeds its scope, or is otherwise invalid.

Claimant, for reasons best known to him, having chosen not to return to the issuing court to seek relief from its garnishment Order seeks to collaterally attack it in this forum on the contention that the issuing court was without jurisdiction to issue an Order affecting the Special Fund. In that connection claimant argues as follows: the court sitting in Clackamas County has to have some jurisdiction by some statute or provision over the person and over the subject matter of the litigation. All right. In this case there's jurisdiction over Ethel Moyle and Raymond Moyle, but there's no jurisdiction to order the Special Fund to do anything. There's no subject matter jurisdiction. That's a federal matter. It's not a state court matter, the Longshore Act in general, and the Special Fund was never a party to the underlying case and, more importantly, to this garnishment. So it's our position that we're entitled to collaterally attack this Order in any court and in any manner, because it's void, not necessarily voidable but void . . . (Tr 12-13)

Claimant's position is without merit. It is perfectly clear from the implementing OPM regulation that the garnished Agency of the United States is not intended to be a party to the action out of which the order of garnishment is issued. The subject regulation at subparts deals with service of process upon and compliance with process by the garnishee governmental entity. (5 CFR 581.201-.307) It is evident that the regulations dealing with service of process are designed to insure that the subject process reach the appropriate agent of the governmental entity involved, that it contains sufficient information on its face, that it was issued for a purpose which comports with the purpose contemplated by the subject regulation, and that the obligor is sufficiently identified as to allow the governmental entity to which the process was directed to enable it to comply with the Order.

Subpart C of the regulation, entitled "Compliance With Process", *inter alia,* requires the garnished governmental entity to notify the obligor of the process served, and requires it to comply with the process except under certain enumerated circumstances none of which is applicable here. I note parenthetically that one of those circumstances is an appeal by claimant (to a "Court" of competent jurisdiction) of either the underlying alimony or the legal process, which remedy claimant has assiduously avoided pursuing. Claimant seeks in this forum to collaterally nullify the effect of the garnishment Order on the ground that certain of the specifications of the governing regulation were not strictly complied with. To whatever extent that may be true, there has been no showing that any portion of the regulation not strictly observed was of a mandatory nature, that the material requirements of the regulation were not substantially complied with so as to comport with due process requirements, or that claimant has suffered any prejudice as a result of such requirements of the regulation as were not strictly complied with. Claimant, for example, vigorously complains that service of process upon the Department was faulty since it was made upon OWCP in Seattle, Washington rather than upon the designated agent for receipt of such process in Washington, D.C. (see 5 CFR Part 581, App. A). Indeed, if any adverse impact has resulted from service of the garnishment Order on the

Department's agent in Seattle, Washington rather than on the designated agent in Washington D.C., (as the presumable consequence of which the August 8, 1991 garnishment Order was not complied with until December 1991), it is not upon claimant. Rather claimant has benefited from any delay in compliance with the garnishment Order and has no standing to complain of it.

In short, I find that under 42 U.S.C. §659, as implemented by 5 CFR Part 581, the Special Fund is required to comply with the subject garnishment Order.

Accordingly, the Director's Motion for Summary Judgment is granted, the Director's Motion for Dismissal is deemed moot, and the relief requested by Claimant is denied.

I note the problematic aspect of the *defacto* modification of a subsisting Order of an Administrative Law Judge by the Director, OWCP, as a consequence of which only a portion or the moneys ordered by the Administrative Law Judge to be paid to claimant by the Special Fund are being paid to him. I do not address the resolution of this problem for future Purposes since I believe it to be a matter to be resolved through appropriate regulation on. In resolution of said problem in this case, however, I hereby enter a *nunc pro tunc* Order modifying the prior ALJ Order so as to allow the subject garnishment.

SO ORDERED this 15th day of April, 1994 at San Francisco, California.

/s/
STEVEN E. HALPERN
Administrative Law Judge

SEH:rf

CERTIFICATE OF FILING

I certify that on April 19, 1994 the foregoing Compensation Order was filed in the Office of the District Director, Fourteenth District office and a copy thereof was mailed on said date by certified mail to the parties and the representatives at the last known address of each as follows:

INJURED WORKER:

RAYMOND V. MOYLE
P.O. BOX 341
YOLO CA 95697

EMPLOYER(S):

JONES OREGON STEVEDORING
PO BOX 10167
PORTLAND OR 97210

INSURANCE CARRIER(S):

SELF-INSURED

COUNSEL FOR CLAIMANT:

POZZI WILSON ATCHISON ET AL.
ATTN: GREGORY A. BUNNELL
14TH FLOOR STANDARD PLAZA
1100 SW SIXTH AVE.
PORTLAND OR 97204

A copy was also mailed by regular mail to the following:

Office of the Solicitor
U.S. Department of Labor
Robert Friel, ARS
1111 Third Ave., Ste 945
Seattle WA 98101-3212

Office of Administrative Law Judges
U.S. Department of Labor
211 Main St., Rm. 600
San Francisco CA 94105

Associates Solicitor of Labor
for Employee Benefits
U.S. Department of Labor
Suite N2716
200 Constitution Ave. NW
Washington D.C. 20210

/s/
KAREN P. GOODWIN
District Director
14th Compensation District
U.S. Department of Labor

NOT FOR PUBLICATION

UNITED STATES COURT OF APP-EALS

FOR THE NINTH CIRCUIT

RAYMOND V. MOYLE,	)	
	)	
Petitioner,	)	No. 96-70875
	)	
v.	)	B.R.B. NO. 94-2390
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS; JONES OREGON STEVEDORING CO.,	)	ORDER
	)	
Respondents.	)	

Before: LAY* , GOODWIN and PREGERSON, Circuit Judge.

The petition for rehearing is denied.

* Honorable Donald P. Lay, Senior United States Circuit Judge for the Eighth Circuit, sitting by designation.

Supreme Court, U.S.
FILED
MAR 8 199
CLERK

No. 98-927

In the Supreme Court of the United States

OCTOBER TERM, 1998

RAYMOND V. MOYLE, PETITIONER

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, AND JONES OREGON STEVEDORING

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

The Social Security Act authorizes the garnishment of "moneys (the entitlement to which is based upon remuneration for employment) due from, or payable by, the United States * * * to any individual" to satisfy "the legal obligation of the individual to provide child support or alimony." 42 U.S.C. 659(a) (Supp. II 1996). The question presented is:

Whether the Social Security Act's garnishment provision applies to disability benefits paid by the Treasurer of the United States under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. 944.

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In the Supreme Court of the United States

OCTOBER TERM, 1998

No. 98-927

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BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A18) is reported at 147 F.3d 1116. The Benefits Review Board's notice of affirmance (Pet. App. B1-B2) is unreported. The decision and order of the administrative law judge (Pet. App. C1-C8) is reported at 28 Ben. Rev. Bd. Serv. (MB) 73.

JURISDICTION

The court of appeals entered its judgment on June 29, 1998. A petition for rehearing was denied on September 4, 1998 (Pet. App. D1). The petition for a writ of

certiorari was filed on December 3, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. The Longshore and Harbor Workers' Compensation Act (Longshore Act), 33 U.S.C. 901 *et seq.*, provides compensation for work-related injuries that result in the disability or death of covered employees engaged in maritime work. 33 U.S.C. 902(3), 903 (1994 & Supp. II 1996). The benefits, which vary with the nature of the disability, are calculated as a percentage of the employee's pre-injury wage-earning capacity. 33 U.S.C. 908, 910.

Most Longshore Act benefits are paid directly by covered employers or their insurance carriers. 33 U.S.C. 904. Some benefits, however, are paid out of a "special fund," which the Longshore Act establishes in the United States Treasury. 33 U.S.C. 944. The special fund is financed by covered employers and insurers, 33 U.S.C. 944(c), and is used to pay several categories of Longshore Act benefits, 33 U.S.C. 944(i), including those payable to employees who, having a preexisting permanent partial disability, suffer a second permanently disabling injury, 33 U.S.C. 908(f)(2)(A), 944(i)(2); see generally 20 C.F.R. 702.143-702.148. Although the monies in the special fund are not "money or property of the United States," the Treasurer of the United States acts as their custodian and disburses them as directed by the Secretary of Labor. 33 U.S.C. 944(a) and (b).

Since 1927, the Longshore Act has contained an anti-alienation provision, which directs that:

> No assignment, release, or commutation of compensation or benefits due or payable under this chapter, except as provided by this chapter, shall be valid,

> and such compensation and benefits shall be exempt from all claims of creditors and from levy, execution, and attachment or other remedy for recovery or collection of a debt, which exemption may not be waived.

33 U.S.C. 916. That provision has been interpreted to prohibit the garnishment of Longshore Act benefits to satisfy claims for spousal or child support. See *Thibodeaux* v. *Thibodeaux*, 454 So. 2d 813 (La. 1984), cert. denied, 469 U.S. 1114 (1985); *Spitalieri* v. *Spitalieri*, 593 N.Y.S.2d 172 (Sup. Ct. 1993).

b. In 1975, Congress amended the Social Security Act to waive the United States' sovereign immunity in order to permit the garnishment of compensation and benefits paid by the United States to meet a payee's alimony and child support obligations:

> Notwithstanding any other provision of law, effective January 1, 1975, moneys (the entitlement to which is based upon remuneration for employment) due from, or payable by, the United States (including any agency or instrumentality thereof and any wholly owned Federal corporation) to any individual, including members of the armed services, shall be subject, in like manner and to the same extent as if the United States were a private person, to legal process brought for the enforcement, against such individual of his legal obligations to provide child support or make alimony payments.

Social Services Amendments of 1974, Pub. L. No. 93-647, § 101(a), 88 Stat. 2357-2358.

In 1977, Congress amended the garnishment provision by adding definitions of terms and by authorizing the President (or his designee) to issue implementing regulations. See Tax Reduction and Simplification Act

of 1977, Pub. L. No. 95-30, Tit. V, § 501(b), (c) and (d), 91 Stat. 158, 159-161. As pertinent here, the 1977 amendments defined moneys "based upon remuneration for employment" to include:

> periodic benefits * * * under * * * any other system or fund established by the United States * * * which provides for the payment of pensions, retirement or retired pay, annuities, dependents' or survivors' benefits, or similar amounts payable on account of personal services performed by himself or any other individual * * * .

91 Stat. 160-161.

In 1996, Congress again revised the garnishment provision. See Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, § 362, 110 Stat. 2242-2247. The 1996 law defines the "moneys subject to process" as, among other things, "worker's compensation benefits paid under Federal or State law." See 110 Stat. 2244, 2245 (codified at 42 U.S.C. 659(h)(1)(A)(iii)(Supp. II 1996)).[1]

2. In 1981, petitioner, who already had a preexisting partial disability, was awarded Longshore Act benefits for a second injury that resulted in his permanent and total disability. Since 1982, his benefits have been paid out of the special fund. Pet. App. A5; Gov't C.A. Br. 3. In 1991, a state court in Oregon

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[1] The 1996 amendments became effective February 22, 1997. Pub. L. No. 104-193, § 362(d), 110 Stat. 2247. To the extent petitioner seeks to terminate the administrative law judge's authorization of continuing garnishment, his case is governed by the current provisions of the law. See *Landgraf* v. *USI Film Prods.*, 511 U.S. 244, 273-274 (1994). To the extent he seeks back benefits that accrued prior to February 22, 1997, his case is governed by the version of the law that was in effect prior to the 1996 amendments.

ordered the garnishment of a portion of petitioner's Longshore Act benefits to satisfy his more than $30,000 in delinquent spousal support obligations. Pet. App. C2. When the Director of the Office of Workers' Compensation Programs notified petitioner that he would honor the garnishment order, petitioner requested a hearing. *Id.* at A5.

The administrative law judge (ALJ) upheld the garnishment. Pet. App. C6. The ALJ held that the Social Security Act's garnishment provision "overrides" the Longshore Act's anti-alienation provision, thereby permitting garnishment of benefits paid out of the special fund. *Id.* at C4. The ALJ gave particular weight to the Office of Personnel Management's (OPM) 1980 regulation, which identified "[b]enefits received under the Longshoremen's and Harbor Workers' Compensation Act" as subject to garnishment, 5 C.F.R. 581.103(c)(5). Pet. App. C3-C4.

Petitioner appealed to the Benefits Review Board (Board). While that appeal was pending, Congress directed that any administrative decision that had been pending on appeal before the Board for more than one year on September 12, 1996, would be considered affirmed. Department of Labor Appropriations Act, 1996, Pub. L. No. 104-134, Tit. I, 110 Stat. 1321-219; see generally *Director, OWCP* v. *Sun Ship, Inc.*, 150 F.3d 288, 291-292 (3d Cir. 1998). Because petitioner's appeal had been pending the requisite period of time, the ALJ decision became the final decision of the Board by operation of law. Pet. App. B1-B2.

3. The court of appeals affirmed. Pet. App. A1-A18. It concluded that, because the Longshore Act's anti-alienation provision (33 U.S.C. 916) and the Social Security Act's garnishment provision (42 U.S.C. 659 (Supp. II 1996)) are in "irreconcilabl[e] conflict[]," Pet.

App. A9; see also *id.* at A9-A13, the latter impliedly repealed the former for purposes of special fund payments. *Id.* at A12-A13. The court explained that the Longshore Act benefits at issue both fall within the plain reach of the garnishment provision's language, *id.* at A10-A11, and were specifically identified in the legislative history of the 1977 amendments as a category subject to garnishment, *id.* at A12.

ARGUMENT

Petitioner contends (Pet. 6-11) that the court of appeals erred in construing the Social Security Act's garnishment provision and the Longshore Act's anti-alienation provision to permit garnishment of a portion of his special fund benefits. Because the court of appeals' decision represents the first and only court ruling of which we are aware that addresses the garnishment of Longshore Act special fund benefits; because the sole argument advanced in the petition in support of review has never been addressed by any court of appeals, including the court below; and because the decision below is consistent with the language of both the Social Security and Longshore Acts and with the longstanding, shared interpretation of the two agencies with rulemaking authority under those statutes, review by this Court is not warranted.

1. The sole argument advanced by petitioner to support review (Pet. 7) is that the Social Security Act's garnishment provision does not supersede the Longshore Act's anti-alienation provision because the Social Security Act subjects federal payments to garnishment only "to the same extent" as if they were paid by a private person. As petitioner admits (Pet. 9 n.5; Pet. C.A. Pet. for Reh'g 4), however, he never briefed this argument below, nor did the court of appeals address it.

See also Pet. App. A13-A17 (identifying and addressing arguments petitioner did raise); Pet. C.A. Br. 2-4. Rather, petitioner's current contention appeared for the first time at oral argument and in his petition for rehearing. By failing to brief the argument before the court of appeals, petitioner waived it. See *Stivers* v. *Pierce*, 71 F.3d 732, 740-741 n.5 (9th Cir. 1995) (argument not briefed, and raised only for the first time at oral argument, is deemed waived). This Court generally will not review arguments that were neither preserved below nor addressed by the court of appeals. See, *e.g.*, *NCAA* v. *Smith*, No. 98-84 (Feb. 23, 1999), slip op. 10 ("[W]e do not decide in the first instance issues not decided below."); *Youakim* v. *Miller*, 425 U.S. 231, 234 (1976).

2. Petitioner does not dispute that the court of appeals applied the pertinent legal analysis and decisions of this Court in determining whether the Social Security Act's garnishment provision superseded the Longshore Act's anti-alienation provision as applied to special fund payments. To the contrary, petitioner espouses the same legal test that the court of appeals applied, analyzing whether the two provisions are in irreconcilable conflict (compare Pet. 6-11 with Pet. App. A10-A13), and relies upon the same authority as the court of appeals (compare Pet. 8-9 with Pet. App. A9 (both relying upon *Radzanower* v. *Touche Ross & Co.*, 426 U.S. 148, 154 (1976)). Petitioner thus simply disagrees with how the court of appeals applied settled legal principles to the particular matter at issue. In the absence of a conflict of decisions, that claim does not warrant this Court's review. See *Sumner* v. *Mata*, 449 U.S. 539, 543 (1981).

3. Moreover, the court of appeals' decision is correct. Petitioner's Longshore Act benefits fall within the plain

language of the garnishment provision. They were and are being paid after 42 U.S.C. 659(a)'s triggering date of January 1, 1975. See Pet. App. A5. They constitute "moneys (the entitlement to which is based upon remuneration for employment)," because they are calculated with reference to and serve as a substitute for petitioner's prior wages as an employee of Jones Oregon Stevedoring Company. See 33 U.S.C. 908; Decision and Order Awarding Benefits, Pet. C.A.E.R. 14-17. Indeed, the garnishment provision separately defines the "[m]oneys subject to process" under its terms to include "periodic benefits * * * under any other system or fund established by the United States which provides for the payment of pensions, retirement or retired pay, annuities, dependents' or survivors' benefits, or similar amounts payable on account of personal services performed by the individual." 42 U.S.C. 659(h)(1)(A)(ii)(II) (Supp. II 1996); see also 42 U.S.C. 659(h)(1)(A)(iii) (Supp. II 1996) ("worker's compensation benefits paid under Federal or State law" subject to garnishment).[2] Finally, the benefits paid by the Treasurer of the United States are moneys "payable by" the United States, as petitioner now concedes (Pet. 7 n.4).

Petitioner contends (Pet. 6-11) that 42 U.S.C. 659(a) (Supp. II 1996) applies only to payments that a "private person" would also have to make and, because the payment of Longshore Act benefits by private employers and insurers falls within the Longshore Act's anti-

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[2] Prior to the 1996 amendments, one district court had held that payments under the Federal Employees' Compensation Act, 5 U.S.C. 8101 *et seq.*, were not subject to garnishment under 42 U.S.C. 659. See *Douglas* v. *Donovan*, 534 F. Supp. 191, 195 (D.D.C. 1982), vacated, 704 F.2d 1276 (D.C. Cir. 1983).

alienation provision, 33 U.S.C. 916, the United States' payment of petitioner's benefits must similarly be insulated from garnishment. Petitioner, however, reads the reference to "private persons" out of context. Read in full, the provision states: "the United States * * * shall be subject, in like manner and to the same extent as if the United States * * * were a private person, to withholding * * * and to any other legal process brought * * * to enforce the legal obligation of the individual to provide child support or alimony." 42 U.S.C. 659(a) (Supp. II 1996). The reference to private persons thus does not qualify the types of payments subject to garnishment. Those are earlier defined comprehensively as all "moneys (the entitlement to which is based upon remuneration for employment)" payable to "any individual" by the United States. 42 U.S.C. 659(a) (Supp. II 1996). Rather, the reference to the liability of private persons limits only the extent to and manner in which the United States "shall be subject * * * to withholding * * * and to any other legal process." The comparison to private persons, in other words, is a qualification on the procedures that can be used to effect garnishment, not the moneys subject to garnishment. See also 42 U.S.C. 662(d) (1994) (defining "private person" as "a person who does not have sovereign or other special immunity or privilege which causes such person not to be subject to legal process").

The legislative history of Section 659 supports this interpretation. The 1974 Senate Report on the original legislation specifically recognized that the garnishment provision would "override provisions in various social insurance or retirement statutes which prohibit attachment or garnishment." S. Rep. No. 1356, 93d Cong., 2d Sess. 54 (1974). Furthermore, in the course of the 1977

amendments, Longshore Act benefits paid by the United States were specifically identified as embraced by the garnishment provision. See 123 Cong. Rec. 9019 (1977) (Sen. Nunn) ("[T]he provisions of section [659] would apply, in addition to those already mentioned, to payments under * * * the Longshoremen's and Harbor Workers' Compensation Act (but only in cases where the payments are made by the United States)."); *id.* at 12,913 (Sen. Nunn) (same).

In addition, OPM, which is responsible for administering and promulgating implementing regulations for Section 659(a),[3] and the Secretary of Labor, who is charged with administering the Longshore Act, 33 U.S.C. 939(a), both agree that Longshore Act benefits are subject to garnishment under Section 659(a), notwithstanding the Longshore Act's anti-alienation provision. Indeed, since 1980, an OPM regulation has identified Longshore Act benefits paid by the United States as subject to garnishment. 5 C.F.R. 581.103(c)(5). The shared interpretation of the two federal agencies vested with rulemaking authority with respect to the relevant statutory provisions merits substantial deference. See *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984).

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[3] See 42 U.S.C. 659(g)(1) (Supp. II 1996); Exec. Order No. 12,105, 3 C.F.R. 262 (1979), as amended, Exec. Order. No. 12,107, 3 C.F.R. 264 (1979).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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